

CHAPTER 22

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CHAPTER 22

COMPETITIVE SOURCING¹ AND PRIVATIZATION

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.²

I. INTRODUCTION. Objectives: Following this block of instruction, students will understand:

- A. The policies and procedures applicable to competitive sourcing.
- B. The policies and procedures applicable to the inventorying of federal positions.
- C. The policies and procedures applicable to military housing and utility privatization.

II. COMPETITIVE SOURCING: BACKGROUND.

- A. Origins.
 - 1. 1955: The Bureau of Budget issued a bulletin establishing the federal policy to obtain goods and services from the private sector.
 - 2. 1966: The Office of Management and Budget (OMB) issued OMB Cir. A-76, which restated this policy but justified using outsourcing for cost-savings. OMB revised the Circular again in 1967, 1979, 1983, and 1999.

¹ “Competitive sourcing” is the latest term for “outsourcing” and “contracting out.”

² FEDERAL OFFICE OF MANAGEMENT AND BUDGET CIRCULAR [OMB] A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, ¶ 4.a (Aug. 4, 1983) [hereinafter OMB CIR. A-76].

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3. 1996: The OMB issued a Revised Supplemental Handbook containing new guidance for OMB Cir. A-76. The OMB updated the Revised Supplemental Handbook in June 1999.

B. Past Legislative Roadblocks.

1. National Defense Authorization Act for FY 1988-89 allowed installation commanders to decide whether to study commercial activities for outsourcing. Codified at 10 U.S.C. § 2468(a), this law expired on 30 September 1995. Most commanders opted not to pursue outsourcing for the following reasons:
 - a. Disruptions to the workforce.
 - b. Cost of conducting the outsourcing studies.
 - c. Loss of control over workforce.
2. Other Roadblocks.
 - a. Department of Defense Appropriations Act for FY 1991 and subsequent DOD appropriations acts prohibited funding OMB Cir. A-76 studies.
 - b. National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost studies done under OMB Cir. A-76.

C. New Direction for OMB Cir. A-76.

1. 1993: National Performance Review: Reinvent government.
2. 1996: Defense Science Board Task Force on Outsourcing and Privatization: DOD could save 20-40 percent by outsourcing support activities.

3. 1997: Quadrennial Defense Review (QDR): Maintain combat readiness means cutting support functions.
4. 1997: Defense Reform Initiative (DRI): Expanded upon the QDR to propose more streamlining and outsourcing.

III. COMPETITIVE SOURCING GENERALLY.

- A. Defined. Competitive Sourcing is the analysis and if appropriate, the transfer of a function previously performed “in-house” by government employees to an private entity, or vice-versa.
- B. Policy. See OMB Cir. A-76, para 5. It is the policy of the U.S. Government to:
 1. Rely on the commercial sector to provide commercial products and services.
 2. Retain inherently governmental functions in-house.
 3. Achieve economy and enhance productivity through the use of cost comparisons.
- C. Authority and Tools. OMB Cir. A-76; OMB Cir. A-76 Revised Supplemental Handbook (Mar. 1996; Revised 1999).
 1. OMB Cir. A-76 embraces the idea of using the commercial sector to provide certain supplies and services for the government if more economical. OMB Cir. A-76, para. 4.a.
 - a. In its simplest terms, OMB Cir. A-76 is a process for agencies to use to determine if it is cheaper for either the government or the private sector to provide supplies or services.
 - b. In this process, both the government private sector offerors prepare proposals and submit estimates for the product or service.

2. The Revised Supplemental Handbook to OMB Cir. A-76 attempts to do the following:
 - a. Balance the interests of the parties involved,
 - b. Provide a level playing field between public and private sector offerors,
 - c. Seek the most cost effective means of obtaining commercial products and support services that are needed on a recurring basis, and
 - d. Provide new administrative flexibility in the government's make or buy decision process.
 3. Scope. The policies and procedures of OMB Cir. A-76 and the Revised Supplemental Handbook apply to all federal executive agencies unless otherwise excluded by law. However, OMB Cir. A-76 and the Revised Supplemental Handbook do not:
 - a. Provide authority to enter into contracts.
 - b. Authorize contracts that create an employer-employee relationship between the government and the contractor employees.
 - c. Justify conversion to contract solely to avoid personnel ceilings or salary limitations.
- D. Key Definitions. The heart and soul of competitive sourcing rests on whether an activity is commercial or inherently governmental.

1. Commercial Activity. A commercial activity is one which is operated by a federal agency and which provides a product or service that is or could be obtained from a private sector source. OMB Cir. A-76, para. 6.a; Revised Supplemental Handbook, Appendix 1. Some examples include the following: automatic data processing; audiovisual products and services; food services; maintenance services; transportation services. OMB Cir. A-76, Attachment A; Revised Supplemental Handbook, Appendix 2.³
2. Inherently Governmental Function. An inherently governmental function is one so intimately related to the public interest as to mandate performance by government employees. OMB Cir. A-76, para. 6.e; Revised Supplemental Handbook, Appendix 1; OFPP Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101. Inherently governmental functions fall into two broad categories:
 - a. The act of governing via the discretionary exercise of government authority. Examples include criminal investigations, prosecutorial and judicial functions, managing and directing the armed forces, and combat, combat support, and combat service support roles.⁴
 - b. Monetary transactions and entitlements. Examples include tax collection and revenue disbursements, control of treasury accounts and money supply, and administering public trusts.
- E. Exemptions. OMB Cir. A-76, para 7.c. The following activities are exempt from OMB Cir. A-76 and the Revised Supplemental Handbook:
 1. Inherently governmental functions.
 2. DOD in times of declared war or military mobilization.
 3. The conduct of research and development.

³ The OMB list is not exhaustive. The OMB cautions agencies to use its suggested list of commercial activities only as a guide.

⁴ For a complete list of inherently governmental functions, *see* OMB Cir. A-76, para. 6.e(1). *See also* OFPP Policy Letter 92-1, *Inherently Governmental Functions*, Appendix A. For example, other inherently governmental functions include conducting foreign policy, determining agency policy, approving contract documents, determining contract costs, awarding contracts, and budget decision. OFPP Policy Letter 92-1 also contains a list of services and actions not considered inherently governmental. *Id.* at Appendix B.

F. Exceptions. OMB Cir. A-76 and the Revised Supplemental Handbook permit exceptions to the general policy of relying on the private sector. These exceptions include the following:

1. No Satisfactory Commercial Source Available. OMB Cir. A-76, para. 8.a; Revised Supplemental Handbook, Part I, Chapter 1, para. C.5; FAR 7.303; AR 5-20, para. 2-3, 4-29b; AFI 38-203, para. 1.1.
2. National Defense. National defense interests may justify performing the activity in-house. OMB Cir. A-76, para. 8.b; Revised Supplemental Handbook, Part I, Chapter 1, para. C.1. This exception includes selected military training in military skills, deployable activities, and rotation base.
3. Patient Care. Patient care performed at a government-operated hospital can be retained in-house, if an agency determines that in-house performance would be in the best interest of direct patient care. OMB Cir. A-76, para. 8.c; Revised Supplemental Handbook, Part I, Chapter 1, para. C.2.
4. Cost Comparison. When a cost comparison demonstrates that in-house performance would be cheaper than contractor performance, the government may retain an activity in-house. OMB Cir. A-76, para. 8.d; Revised Supplemental Handbook, Part I, Chapter 1, para. C.8.
5. Core Capabilities. The agency must maintain a minimum core capability of specialized employees to ensure that it can fulfill its mission responsibilities and emergency requirements. Revised Supplemental Handbook, Part I, Chapter 1, para. C.3.

G. DOD Commercial Activities Program: The implementation of OMB Cir. A-76.

1. Authority and Tools: OMB Cir. A-76; Revised Supplemental Handbook; DODD 4100.15; AR 5-20; AFD 38-6; AFI 38-203, para 1.1.
2. Policy. DODD 4100.15, para D. When implementing a commercial activities program, DOD components must consider the following policy guidance:
 - a. Ensure DOD mission accomplishment.

- b. Achieve economy and quality through competition.
- c. Retain governmental functions in-house.
- d. Rely on the commercial sector, except when required for national defense, no satisfactory source is available, or when in the best interests of patient care.
- e. Delegate decision authority and responsibility to lower organizational levels to give commanders freedom to “intelligently use their resources” while preserving essential wartime capability.
- f. Provide placement assistance for displaced federal employees.

IV. THE A-76 STUDY PROCESS.

- A. Generally. The A-76 study process sets forth whether—and if so, how—to perform a cost comparison study for a commercial activity. The A-76 study process falls into the following broad areas:
 - 1. Conducting the inventory and review (figuring out what we have).
 - 2. Identifying the players (the team).
 - 3. Preparing the plans.
 - 4. Seeking offers.
 - 5. Choosing a winner.
 - 6. Understanding the post-award review options.
 - 7. Final Decision and implementation.

B. Conducting the Inventory and Review.

1. The Inventory Requirement. 10 U.S.C. § 2468(b); DOD Instr. 4100.33, para. 9. An inventory is a listing of all in-house and contracted commercial activities on an installation. Each agency evaluates all its activities and functions to determine which are inherently government functions and which are commercial activities.
2. The Review Requirement. DOD Instr. 4100.33, para. 9.
 - a. The agency must review its existing in-house commercial activities to determine whether it should convert them from in-house to contract status. This involves a two-step approach:
 - (1) The agency must first determine whether the activity must remain in-house for reasons other than lower cost, such as no commercial source available, patient care, etc.
 - (2) If the agency determines that a commercial activity does not fit one of the categories above, then it may face the requirement of a cost comparison study.
 - b. Direct Conversions. Activities with 10 or fewer full time equivalent employees may be converted without cost comparison, if the contracting officer determines that fair and reasonable prices cannot otherwise be obtained. Revised Supplemental Handbook, Part I, Chapter 1, para. C.6. The annual Defense Appropriations Act generally prohibits conversions involving more than 10 DOD civilian employees. See Section 8014 of the FY 2000 Defense Appropriations Act, Pub. L. No. 106-76, 113 Stat. 1212, 1234.
 - c. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of OMB Cir. A-76. Revised Supplemental Handbook, Part II, Chapter 5. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding that there is no requirement for a management plan or MEO as part of streamlined cost comparisons).

C. Identifying the Players.

1. Congress. The installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons perform the function proposed for OMB Cir. A-76 study. DOD in turn, must notify Congress. 10 U.S.C. § 2461(a).
2. Cost Comparison Study Team. A group of functional experts in the agency who prepare several plans (discussed in paragraph H.4, infra) and develop the agency's cost estimate, known as the Most Efficient Organization (MEO).
3. Unions. At least monthly, the installation must keep affected DOD employees notified of developments. 10 U.S.C. § 2467(b).

D. Preparing the Plans.

1. Performance Work Statement (PWS). The PWS serves as the heart of the possible future solicitation. DOD Instr. 4100.33, para. 15(d)(2). The PWS defines the agency's needs, the performance standards and measures, and the timeframe for performance. The PWS is a budget driven document. DOD Instr. 4100.33, para. 17B; Revised Supplemental Handbook, Part I, Chapter 1, para. I.
2. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, para. D.
3. Management Plan. The management plan defines the overall structure for the MEO. This organizational structure serves as the government's proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, para. E; DOD Instr. 4100.33, para. 15(d)(3).
4. Most Efficient Organization (MEO). The MEO describes the way the government will perform the commercial activity and at what cost.

E. Seeking Offers.

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods under the FAR. Revised Supplement Handbook, Part I, Chapter 3, para. H.1.
 - a. Sealed bidding.
 - b. Two-Step.
 - c. Negotiated procurements.
2. Issue the solicitation. The agency issues the solicitation to seek offers from the private sector.
3. Negotiated Procurement. Special rules apply if the agency chooses negotiated procurements. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.
 - a. Source Selection Authority (SSA). The Source Selection Authority reviews contract offers and identifies the offer that represents the “best value” to the government. See NWT, Inc.; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158. The contracting officer then submits to the Source Selection Authority the government’s in-house offer (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, paras. H.3.c-d.
 - b. Independent Review. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the Independent Review Officer. This review assures that the government’s in-house cost estimate is based upon the same scope of work and performance levels as the best value contract offer. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.e.

F. Choosing the Winner.

1. The private offeror “wins” the OMB Cir. A-76 study if it beats the in-house or MEO estimate by a minimum cost differential of the lesser of
 - a. 10 percent of personnel costs, or
 - b. \$10 million over the performance period. The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part I, Chapter 4, para. A.1.
2. Otherwise, the MEO “wins” and the installation keeps the commercial activity in-house.

G. Post-Award Review.

1. The Agency Appeal Process. FAR 7.307; DOD Instr. 4100.33, para. 18; Revised Supplemental Handbook, Part I, Chapter 3, para. K.
 - a. OMB Cir. A-76 requires agencies to develop an internal appeal process to challenge cost comparison decisions.
 - (1) The agency must receive appeal within 20 calendar days of announcement of tentative decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.b. But see Apex Int'l Management Servs., Inc., B-228885.2, Jan. 6, 1988, 88-1 CPD ¶ 9 (finding low bidder not bound by agency time limits when rebutting challenge to its standing to receive award); FAR 52.207-2 (providing for a public review period of 15-30 working days, depending upon the complexity of the matter);
 - (2) The appeal must be based on noncompliance with the requirements and procedures of OMB Circular A-76 or specific line items on Cost Comparison Form; and

- (3) The appeal must demonstrate that information has been wrongly withheld or the result of appeal would change cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.
 - b. Only “interested parties” may submit agency appeals. This encompasses directly affected parties: federal employees and their representative organizations; bidders; and offerors. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.
 - c. Decision on Appeal. The agency should provide for a decision within 30 days after the Appeal Authority received the appeal. Revised Supplemental Handbook, Part I, Chapter 3, para. K.8.
2. Protests to the General Accounting Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.
 - a. Standing.
 - (1) Only an “interested party” as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).
 - (2) Unlike the agency appeal process, “interested party” does not encompass affected employees or their labor unions. See Part V.B.2., infra.
 - b. Timing.

- (1) The protester must exhaust the agency appeal process. See Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process); Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 (dismissing cost comparison protest as premature).
 - (2) The protester must file the protest within 10 working days of agency decision. See Base Services, Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 (finding a protest filed during the 15-day review period mandated by FAR 7-307 was timely); Northrop Worldwide Aircraft Servs., Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (finding appeal filed 10 working days after agency decision); Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (finding irrelevant if the protester requests reconsideration by agency). Note: New bid protest rules have reduced the time for filing a protest to 10 calendar days.
- c. Standard of Review. When reviewing cost comparison decisions, the GAO applies the following standard of review:
- (1) To determine “whether the comparison was conducted reasonably”;
 - (2) To determine if the agency complied with applicable procedures; and
 - (3) If the agency failed to follow procedures, to determine if the failure could have materially affected the outcome of the cost comparison.
- d. Trends. From the GAO cases decided since late 1998, several trends have emerged in A-76 study process protests.

- (1) The A-76 process is a contracting process and the GAO will treat it as such. See, e.g., NWT, Inc., PharmChem Laboratories, Inc., B-282988, B-280988.2, Dec 17, 1998, 98-2 CPD ¶ 158 (holding that agencies could apply best value to cost comparison studies); Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (applying agency debriefing requirement to cost comparison studies).
- (2) As a contracting process, the cost study procedures must be fair. See, e.g., Rice Servs. Ltd., B-284997, June 29, 2000, 2000 U.S. Comp. Gen. LEXIS 106 (finding that the Navy failed to evaluate fairly the contractor and government proposals); IT Facility Services-Joint Venture, B-285841, Oct. 17, 2000 (determining if a conflict of interest existed for government evaluators in the cost comparison process); DZS/Baker LLC, Morrison Knudsen Corp., B-281224, et seq., Jan. 12, 1999, 99-1 CPD ¶ 19 (analyzing conflicts of interest in cost comparison studies).
- (3) Within reason, the GAO will accord agencies discretion in their cost studies. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding agency did not err in adding contract administration costs to the contractor's proposal); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (holding agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the management plan and MEO); Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 18 (holding that the GAO will not look at MEO staffing pattern absent fraud or bad faith).
- (4) The General Accounting Office will not review the agency's decision not to issue a solicitation for cost comparison purposes. Inter-Con Security Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187.

3. Court Challenges.

- a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provide the U.S. Court of Federal Claims (COFC) and the district courts of the United States with concurrent jurisdiction to hear pre-award and post-award bid protests. Specifically, each court independent of the other has jurisdiction to hear protests that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).
- b. Standing.
 - (1) Only an “interested party” under the ADRA has standing to challenge procurement decisions, though the term is not limited to just those parties covered by CICA. See e.g., Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000); Winstar Communications, Inc. v. United States, 41 Fed. Cl. 748 (1998); CCL, Inc. v. United States, 39 Fed. Cl. 780 (1997).
 - (2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities. See Part V.B.3., infra.

H. Final Decision and Implementation.

1. Once the appeal period has expired, then the Decision Summary is sent to the agency for approval by the Secretary of Defense and notice to Congress. 10 U.S.C. § 2461(a).
2. The approval is either for award to the contractor or retention in house.
3. If the MEO wins the cost study, then it will be implemented upon the commander’s approval.
4. Contractor Implementation.
 - a. Reviews. Contracted commercial activities will be continually monitored to ensure that performance is satisfactory and cost effective.

- b. If contractor defaults during the first year:
 - (1) Award to the next offeror in line at an adjusted price for the remainder of the contract term.
 - (2) If the MEO is the next low, implement the MEO if feasible.
 - (3) If contract cannot be performed by the next offeror or MEO (as above), issue a new solicitation without a cost comparison study, reprocure from an original contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house. Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.
 - (4) If the contractor defaults after the first year, seek interim contract support and solicit a new contractor, reprocure from a contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house.

5. MEO Implementation: Post-MEO Performance Reviews.

- a. When services are performed in-house following a cost comparison, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented and deficiencies are not corrected, re-award to the next offeror if feasible, or initiate a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1.
- b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year. If changes in functions or workloads occur, the performance work statement (PWS) should be modified and such modification should be fully documented.
- c. Reviews will be conducted on at least 20 percent of the in-house functions after a full year of performance. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

V. CIVILIAN PERSONNEL ISSUES.

A. Civilian Personnel Management.

1. The servicing Civilian Personnel Office must coordinate with management officials, employees, and union officials to minimize personnel turbulence and adverse effects on employees. AR 5-20, para. 3-1; AFCAPI, para. 8.4.4.
2. Commanders must ensure that the Civilian Personnel Office is brought into the planning, review, and conduct of cost comparison studies from the beginning. AR 5-20, para. 3-1; AFCAPI, para. 8.4.1.
3. As noted earlier, the installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons (civilians) perform the function proposed for OMB Cir. A-76 study. DOD, in turn, must notify Congress. 10 U.S.C. § 2461(a).
4. At least monthly during the conduct of a cost competition or direct conversion study, commanders shall consult with civilian employees who will be affected by the study and consider their views on the development and preparation of the performance work statement and the management study. 10 U.S.C. § 2467.
 - a. At the earliest possible stages, affected parties will have the opportunity to participate in the development of documents and proposals, including the performance standards, performance work statement, management plans and the development of in-house cost estimates. Revised Supplemental Handbook, Part I, Chapter 1, para. G.
 - b. Upon issuance, a solicitation used in a cost comparison will be made available to directly affected employees and their representatives for comment. They will be given sufficient time to review the document and submit comments before final receipt of offers from the private sector. Revised Supplemental Handbook, Part I, Chapter 1, para. G.

5. Reduction-in-Force Planning. The Civilian Personnel Office must provide sufficient lead-time to issue Reduction-in-Force (RIF) notices to ensure a timely transition for the cost comparison decision. Every reasonable effort will be made to place or retrain displaced civilian employees. If no vacancies exist or are projected, coordinate with state employment offices for retraining opportunities under the Job Training Partnership Act. Commanders should make every effort to help separated employees find continuing employment elsewhere, especially through the right of first refusal. See generally AR 5-20, para. 3-4; AFCAPI, para. 8.4.4.1.1.

B. Federal Employee/Union Remedies.

1. Agency Appeals. Federal employees and their representative organizations are interested parties for purposes of agency appeals of cost comparison commercial activity studies. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.
2. GAO Protests. Federal employees, as well as labor unions representing potentially displaced federal workers, do not have standing to challenge a procurement to contract out services that were previously performed by government employees, because they are not “actual or prospective bidders.” American Fed’n of Gov’t Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed’n of Gov’t Employees, B-223323, 86-1 CPD ¶ 572; American Fed’n of Gov’t Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.
3. Court Challenges. Federal employees and labor unions have had limited success challenging an agency decision to outsource positions.
 - a. AFGE, AFL-CIO, AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000)(holding that federal employees and their unions lacked standing as they were not within the zone of interests protected by the statutes that they alleged were violated).
 - b. AFGE v. United States, 104 F. Supp. 2d 58 (D.C. Dist. Ct 2000) (holding that federal employees and their unions did have standing to challenge a direct conversion to preferentially-treated Native American firms pursuant to Section 8014 of the FY 2000 Defense Appropriations Act).

- c. AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding that displaced federal employees and their unions did not have standing under 10 U.S.C. § 2462 to challenge the Army's decision to award two contracts to private contractors, but had standing here under the Arsenal Act (10 U.S.C. § 2542)).
 - d. AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding that governmental employees and their labor union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).
 - e. National Air Traffic Controllers Ass'n v. Pena, 78 F.3d 585 (6th Cir. 1996)(not recommended for full-text publication)(holding that employees had standing to challenge the agency's determination that their positions were not inherently governmental functions).
 - f. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding that the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).
 - g. NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding that displaced federal workers and their unions do not have standing to challenge the A-76 cost comparison process).
4. Grievances. OMB Cir. A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

C. Right of First Refusal: Generally. FAR 52.207-3.

1. The clause reads as follows:

The Contractor shall give the Government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards. Within 10 days after contract award, the Contracting Officer will provide to the Contractor a list of all Government employees who have been or will be adversely affected or separated as a result of award of this contract.

2. The right of first refusal extends only to permanent employees. It does not extend to temporary employees. A union has associational standing to challenge the granting of this right. See National Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228 (1986). The contractor shall report to the Contracting Officer the names of individuals identified in the list who are hired within 90 days after contract performance begins. This report shall be forwarded within 120 days after contract performance begins.

D. Right of First Refusal: Relationship with Conflict of Interest Laws.

1. In most instances, federal employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact when and if they may exercise their right of first refusal.
2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.
 - a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during an OMB Cir. A-76 study.

- b. Reporting Employment Contacts (41 U.S.C. § 423(c)).
 - (1) FAR 3.104-3 generally excludes from the scope of “personally and substantially” the following employee duties during an OMB Cir. A-76 study:
 - (a) Management studies;
 - (b) Preparation of in-house cost-estimates;
 - (c) Preparation of the MEO; or
 - (d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.
 - (2) MEO role. Probably not required to report employment contacts.
 - (3) PWS role. Consider employee’s role: technical only?
- c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.
 - (1) Applies to contracts exceeding \$10 million, and
 - (a) Employees in any of these positions:
 - (i) Procuring contracting officer;
 - (ii) Administrative Contracting Officer;
 - (iii) Source Selection Authority;
 - (iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding \$10 million;

(ii) Award modification of contract or subcontract exceeding \$10 million;

(iii) Award task or delivery order exceeding \$10 million;

(iv) Establish overhead rates on contract exceeding \$10 million;

(v) Approve contract payments exceeding \$10 million; or

(vi) Pay or settle a contract claim exceeding \$10 million.

(2) No exception to one-year ban for offers of employment pursuant to right of first refusal. Thus, employee performing any of the listed duties or making the listed decisions on cost comparison resulting in a contract exceeding \$10 million is barred for one year after performing such duties from accepting compensation/ employment opportunities from contract via the right of first refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a “particular matter” affecting the officer or employee’s personal or imputed financial interests.⁵
 - a. Cost comparisons conducted under OMB Cir. A-76 are “particular matters” under 18 U.S.C. § 208.
 - b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a “direct and predictable” effect on their financial interests. This determination is very fact specific.
4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the “intent to influence.”
 - a. The ban may be lifetime, for two years, or for one year, depending on the employee’s involvement in the matter.
 - b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves “specific parties.”
 - c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the right of first refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

⁵ In January 1999, the GAO sustained a cost comparison study protest because 14 of the 16 agency evaluators held positions subject to being contracted out. The GAO found an organizational conflict of interest under FAR Subpart 9.5. DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19. OMB subsequently issued guidance stating that it is a “better business practice” to limit participation on source selection teams of those personnel whose jobs are involved in a cost comparison. OMB Circular No. A-76 (Revised) Transmittal Memorandum No. 22 (Aug. 31, 2000), 65 Fed. Reg. 54,568-70 (2000). Accordingly, “individuals who hold [affected] positions in an A-76 study should not be members of the Source Selection Team, unless an exception is authorized by the head of the contracting activity.” *Id.* In October 2000, the GAO found that source selection evaluation board evaluators whose positions would not be directly affected by the cost comparison study did not have conflict of interests. IT Facility Services-Joint Venture, B-285841, Oct. 17, 2000.

VI. FEDERAL ACTIVITIES INVENTORY REFORM ACT (FAIR ACT) OF 1998,”
Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

A. Generally. The FAIR Act addresses certain parts of the competitive sourcing process.

1. Key features:

- a. Codifies the definition of “inherently governmental function.” The “new” statutory definition mirrors the definition of inherently governmental function already found in OFPP Policy Letter 92-1, Inherently Governmental Function, para. 5.
- b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities) performed by federal (civilian) employees. After mutual consultation, both OMB and the agency will make the list public. The agency will also forward the list to Congress.
- c. Provides “interested parties” the chance to challenge the list within 30 days after its publication. The “interested party” list includes a broad range of potential challengers:

(1) A private sector source that is:

- (a) an actual or prospective bidder for any contract (or other form of agreement) to perform the activity, and
- (b) has a direct economic interest in performing the activity that would be adversely affected by a decision not to procure the activity from the private sector;

(2) A representative of any business or professional group that includes those private sector sources in its membership;

- (3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity; and
 - (4) The head of any labor organization referred to in 5 U.S.C. § 7103(a)(4) that includes within its membership those officers or employees.
- d. Requires agencies to use a competitive process to select a private sector source, except as provided by law, regulation, or circular.
 - e. Requires agencies to conduct “realistic and fair” cost comparisons when deciding whether to contract with a private sector source.

B. OMB Guidance on the FAIR Legislation.

- 1. Congress directed the OMB to issue guidance to implement the FAIR. On 1 March 1999, the OMB issued draft guidance for public comment. The draft guidance is at 64 Fed. Reg. 10031 (March 1, 1999). After receiving public comments, the OMB issued its final guidance on 24 June 1999. 64 Fed. Reg. 33927 (June 24, 1999).
- 2. To implement the FAIR, the OMB changed both OMB Cir. A-76 and its Revised Supplemental Handbook. The key provisions of the OMB guidance are as follows:
 - a. *Revised Supplemental Handbook, Part I, Chapter 1, para. A:* The OMB Guidance added a reference to the FAIR Act in the first sentence. As revised, Part I of the Revised Supplemental Handbook states that it contains the “principles and procedures” for implementing the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 1.
 - b. *Revised Supplemental Handbook, Part I, Chapter 1, para. B:* The OMB Guidance added a reference to the FAIR Act’s definition of inherently governmental function. As revised, the Revised Supplemental Handbook states that its definition of inherently governmental function conforms with the one in the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 6.e.

- c. *Revised Supplemental Handbook, Part II, Chapter 1, para. A.1:* The OMB guidance added a reference to the FAIR Act in the first sentence. As revised, the Revised Supplemental Handbook states that it contains the “generic and streamlined cost comparison guidance” to comply with the FAIR Act.
- d. *Revised Supplemental Handbook, Appendix 2:* The OMB guidance changed the name from the OMB Circular No. A-76 Inventory” to the “Commercial Activities Inventory.” The OMB guidance further revised Appendix 2 as follows:
 - (1) *Paragraph A:* The OMB Guidance added the FAIR Act’s inventory requirement and 30 June due date. It also added two additional data elements to the agency’s description of a commercial activity: the year the activity first appeared on the inventory under FAIR, and the agency point of contact responsible for the activity. A similar revision is found in OMB Cir. A-76, para. 10.
 - (2) *Paragraph G (new):* The OMB guidance added the FAIR Act’s requirements to review and publish the inventories and the process “interested parties” can use to challenge the inventory. A similar revision is found in OMB Cir. A-76, paras. 6.h, 10.
 - (3) *Paragraph H (new):* The OMB guidance added the FAIR Act’s requirements for agencies to review their inventories and use a competitive process, with a cost comparison procedure, when considering contracting with the private sector for the performance of an activity on the inventory.

C. The FAIR Lists.

1. Under the OMB guidance, agencies are required to list the “noninherently governmental activities,” using “reason” and “function” codes.
 - a. The reason codes would show whether or not the agency believed that the commercial activity would be subject to a cost study, and would include those commercial activities that cannot be competed because of a legislative or other exemption.
 - b. The function code characterizes the type of activity that the agency performs.
2. The OMB has released the names of the agencies that have published their lists. See 64 Fed. Reg. 52,809 (1999) (providing notice of the first 52 agencies that have published their lists); 64 Fed. Reg. 58,641 (1999) (providing notice that NASA and the Department of Energy have published their lists); 64 Fed. Reg. 73,595 (1999) (providing notice that DOD published its list).
3. Several interested parties have challenged FAIR Act inventories from certain agencies, such as NASA, the Environmental Protection Agency, and the Department of Commerce.

D. Reactions to the FAIR Act Lists.

1. General Accounting Office. The GAO has released several reports assessing how agencies have implemented the FAIR Act.⁶ The reports have noted the following issues and deficiencies:
 - a. The decisions agencies made about whether or not activities were eligible for competition and the reasons for those decisions.
 - b. The processes agencies used to develop their FAIR Act inventories.

⁶ GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: PRELIMINARY ISSUES REGARDING FAIR ACT IMPLEMENTATION, REPORT NO. GAO/T-GGD-00-34 (Oct. 28, 1999).

- c. The usefulness (or uselessness) of the FAIR Act inventories.
 - d. The need for additional information in future FAIR Act inventories.
- 2. Congressional Testimony. Several individuals testified before the House Committee on Government Reform on 28 October 1999 about the FAIR Act implementation. These comments may be summarized as follows:
 - a. The OMB guidance is inadequate and did not carry out the intent of Congress when it passed the FAIR Act.
 - b. The completed lists are difficult to access and the OMB should make them centrally available.
 - c. Congress should impose a moratorium on outsourcing until a complete picture of the true size of the federal contracting workforce is available.

VII. DOD COMPETITIVE SOURCING REPORTS/STUDIES.

- A. Early on in the competitive sourcing fray, the General Accounting Office reviewed the DOD's cost savings efforts with mixed results.⁷ The General Accounting Office noted that DOD faced several challenges in conducting cost studies with the goal of saving significant dollars. Some of the challenges the General Accounting Office spotted included the following:
 - 1. Costs savings of 20-40 percent overstated for several reasons:
 - a. DOD derived the projected savings from limited database information; and
 - b. DOD has the potential to save money with large omnibus contracts, but these tools have their own constraints.

⁷ See GENERAL ACCOUNTING OFFICE, OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BUT DEFENSE SCIENCE BOARD PROJECTIONS ARE OVERSTATED, Report No. GAO/NSIAD-98-48 (Dec. 8, 1997); GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, Report No. GAO/NSIAD-97-86 (Mar. 11, 1997).

2. Historical impediments to competitive sourcing, such as:
 - a. Lack of resources to conduct OMB Cir. A-76 studies as a result of downsizing and civilian personnel cuts.
 - b. Time limits for studies are short. The Revised Supplemental Handbook contains limits for cost comparison studies: 18 months for single activities, 36 months for multiple activities. DOD is also constrained by statutory time limits. See Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2302 (1998).
 - c. Legislative constraints on competitive sourcing, such as congressional notification of cost studies and annual reports to Congress. In addition, 10 U.S.C. § 2465 precludes outsourcing of firefighters and security guards, except under limited circumstances.

B. The General Accounting Office evaluated DOD's competitive sourcing efforts and assigned DOD a "report card" of sorts.⁸ The General Accounting Office reviewed completed competitions between October 1995 and March 1998; reviewed the completion time, savings produced; and identified problems in implementing the results. Some of the key results the General Accounting Office focused on are as follows:

1. Completed cost studies totaled 53, involving 5757 positions (3226 military and 2531 civilian). Of the 53 competitions, 43 involved single functions (such as grounds maintenance) and 10 involved multiple functions (such as base operating support contracts). Of the completed cost studies, 85 percent belonged to the Air Force. The private sector won 60 percent of the completed cost studies.

⁸ GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: RESULTS OF RECENT COMPETITIONS, Report No. GAO/NSIAD-99-44 (Feb. 23, 1999). For a companion GAO report, see GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: QUESTIONS ABOUT GOALS, PACE, AND RISKS OF KEY REFORM INITIATIVE, Report No. GAO/NSIAD-99-46 (Feb. 22, 1999). The GAO has issued other recent reports. See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, GAO/NSIAD 99-152 (July 21, 1999); GENERAL ACCOUNTING OFFICE, A-76 NOT APPLICABLE TO AIR FORCE 38TH ENGINEERING INSTALLATION WING PLAN, Report No. GAO/NSIAD-99-73 (Feb. 26, 1999); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: KEY ELEMENTS OF FEDERAL BUILDING AND FACILITY PARTNERSHIPS, Report No. GAO/GGD-99-23 (Feb. 3, 1999); GENERAL ACCOUNTING OFFICE, DEFENSE HEADQUARTERS: STATUS OF EFFORTS TO REDUCE HEADQUARTERS PERSONNEL, Report No. GAO/NSIAD-99-45 (Feb. 17, 1999); GENERAL ACCOUNTING OFFICE, GOVERNMENT MANAGEMENT: OBSERVATIONS ON OMB'S MANAGEMENT LEADERSHIP EFFORTS, Report No. GAO/T-GGD/AIMD-99-65 (Feb. 4, 1999)

2. DOD performed the cost studies generally within the established time frames. The average completion time was 18 months for single functions and 30 months for multiple functions.
3. DOD's projected cost savings of \$528 million is subject to change over time.
4. DOD has experienced few problems implementing the results of the cost studies. To date, however, many of the completed studies have been in effect for an average of 15 months or less. Thus, the General Accounting Office noted that it could not offer a meaningful assessment of performance.

C. Lessons Learned.

1. In 1999, the GAO also evaluated the DOD's competitive sourcing process for lessons learned.⁹
2. The report offered the following observations:
 - a. The DOD has improved its competitive sourcing studies, but needs to devote more time to identify and disseminate best practices DOD-wide.
 - b. The DOD has improved the quality of the performance-based work statements for the cost studies, but has limited efforts to develop standard.

VIII. HOUSING PRIVATIZATION.

- A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership, control and responsibility, and not just a transfer of performance.

⁹ GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, REPORT NO. GAO/NSIAD 99-152 (July 21, 1999).

- B. Authority. 10 U.S.C. §§ 2871-85 provides temporary authority for military housing privatization. This legislation expires in 2001 (although the draft FY 2001 National Defense Authorization Act plans to extend such authority for an additional five years).
1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.
 2. Secretary may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:
 - a. Direct loans and loan guarantees to private entities.
 - b. Build/lease authority.
 - c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.
 - d. Rental guarantees.
 - e. Differential lease payments.
 - f. Conveyance or lease of existing properties and facilities to private entities.
 3. Establishment of Department of Defense housing funds.
 - a. The Department of Defense Family Housing Improvement Fund.
 - b. The Department of Defense Military Unaccompanied Housing Improvement Fund.
- C. Goals and Projects.

1. Goals. The DOD goals for the housing privatization process are twofold:
 - a. The stated goal is to eliminate all inadequate family housing by 2010.
 - b. The unstated goal is to get the services out of business of family housing ownership.
2. Current Army Housing Privatization Projects.
 - a. Ft. Carson awarded a 50-year contract on September 30, 1999, for the privatization of 1,823 existing family housing units, and the construction of 840 new units.
 - b. Ft. Hood awarded a 50-year contract on June 28, 2000, for the privatization of 5,482 existing family housing units, plus the construction of 1149 new units.
 - c. Ft. Lewis awarded a 50-year contract on August 30, 2000, for the privatization of 3,589 existing family housing units, plus the construction of 759 new units.
 - d. Ft. Meade (2,862 existing units, plus 308 new units): currently accepted proposals from contractors.
 - e. The Army is proposing 16 additional family housing privatization projects from FY02 to FY05.

D. Implementation.

1. The service conveys ownership of existing housing units, and leases the land upon which they reside for up to 50 years.
2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.
3. The contractual agreement may include provisions regarding:
 - a. The amount of rent the contractor may charge military occupants (rent control).
 - b. The manner in which soldiers will make payment (allotment).
 - c. Rental deposits.
 - d. Loan guarantees to the contractor in the event of a base closure or realignment.
 - e. Whether soldiers are required to live there.
 - f. The circumstances under which the contractor may lease units to nonmilitary occupants.

E. Issues and Concerns.¹⁰

1. Loss of control over family housing.
2. The affect of long-term agreements.

¹⁰ See GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE, Report No. GAO/NSIAD-00-71 (March 30, 2000); GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: PRIVATIZATION OFF TO A SLOW START AND CONTINUED MANAGEMENT ATTENTION NEEDED, Report No. GAO/NSIAD-98-178 (July 17, 1998).

- a. Future of installation as a potential candidate for housing privatization.
 - (1) DOD must determine if base a candidate for closure.
 - (2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.
 - b. Potential for poor performance or nonperformance by contractors.
 - (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.
 - (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.
3. Affect on federal employees.
- a. The privatization of housing will result in the elimination of those government employee positions which support family housing.
 - b. Even other garrison directorates/activities that support family housing will result in the elimination of jobs/positions (e.g., DECAM).
4. Prospects of civilians living on base.
- a. Civilians allowed to rent units not rented by military families.
 - b. This prospect raises some issues, such as security concerns and law enforcement roles.

IX. UTILITIES PRIVATIZATION.

- A. Authority. 10 U.S.C. 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.
- B. Implementation.
 - 1. The DOD goal is to privatize all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique security reasons or when privatization is uneconomical. Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems. While DRID #49 does not specifically direct the privatization of steam, hot and chilled water, and telecommunications at this time, it does not prohibit such privatization. The overall objective is to get DOD “out of the business” of owning, managing, and operating utility systems by privatizing them.
 - 2. In FY99, the Army privatized (or exempted) 37 systems. Current plans are to privatize 100 systems in FY00, 100 systems in FY01, and 83 systems in FY02.
 - 3. Requests for exemption from utility systems privatization must be approved by the Secretary of the Army. Exemption request, which must be forwarded through the appropriate MACOM to OACSIM, must include:
 - a. Letter from installation commander to MACOM request exemption from privatization;
 - b. Endorsement by MACOM to OACSIM;
 - c. Written synopsis of process conducted to solicit for award, including analysis, alternatives, feasibility, and results;
 - d. Completed economic analysis; and

- e. Separate letters from the contracting officer and legal counsel concurring with the analysis, review, and decision to request exemption. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).
- 4. Installations shall use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. §2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. §2688(c)(3).
- 5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. §2688(c).
- 6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.
- 7. Installations must submit notice to Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of the utility privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the Department concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. §2688(e).

C. Current Legal Issues.

1. The Affect of State Law and Regulation. State utility law and regulation, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply to federal utility privatization. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding that 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).
2. Bundling. An agency may employ restrictive provisions or conditions (such as bundling) only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.
3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are but one option. Presently, the Army General Counsel's Office does not favor the use of reversionary clauses as the means to accomplish this end.
4. Affect of A-76. Privatization of Army-owned utility systems does not involve OMB A-76 (no cost comparison required).
5. Right of First Refusal. Presently, private sector companies already operate many Army installation utility plants. As the OMB Circular A-76 rules do not apply to utility privatization actions, there is no automatic "right of first refusal" for affected government employees. However, the privatization negotiations may include the placement of current personnel.
6. Model Solicitation for Utilities System Privatization. The Defense Energy Support Center (DESC) is presently working on a model solicitation that installations may use for utility system privatization efforts.

X. CONCLUSION.

- A. Service contracting plays a major role in installation contracting, especially in the wake of the competitive sourcing push. Moreover, competitive sourcing and privatization projects are prevalent within DOD.
- B. As attorneys, you may find yourself advising commanders and functional experts on the competitive sourcing and privatization process. Thus, you should familiarize yourself with several substantive areas, such as labor, standards of conduct, and contracting.

APPENDIX A

COMPETITIVE SOURCING AND PRIVATIZATION REFERENCES

1. 10 U.S.C. §§ 2460-2469.
2. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382.
3. Federal Office of Management and Budget Circular A-76 (4 Aug. 1983; Revised 1999), Performance of Commercial Activities.
4. Federal Office of Management and Budget Circular A-76 Revised Supplemental Handbook, Performance of Commercial Activities (March 1996; Revised 1999).
5. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 7.3 (June 1997).
6. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 9.5 (June 1997).
7. General Servs. Admin., et.al., Federal Acquisition Reg., Pt. 37 (June 1997).
8. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
9. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985).
10. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct 1997).
11. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (July 1998).
12. Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracts, 59 Fed. Reg. 26,818 (1994).
13. Office of Federal Procurement Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101 (1992).
14. Office of Federal Procurement Policy Letter 91-2, Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (1991).
15. U.S. Dep't of Defense Reform Initiative Directive #49-Privatizing Utility Systems (23 Dec. 1998).
16. Memorandum, Acting General Counsel, U.S. Dep't of Defense Office of the General Counsel to the General Counsels of the Military Departments, subject: The Role of State Laws and Regulations in Utility Privatization (24 Feb 2000).
17. U.S. Dep't of Army, Privatization of Army Utility Systems Brochure (May 1999).
18. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).
19. U.S. Dep't of Air Force Pol. Dir. 38-2, Manpower (Mar. 1995).
20. U.S. Dep't of Air Force Pol. Dir. 38-6, Outsourcing and Privatization (Sep. 1997).
21. U.S. Dep't of Air Force Instr. 38-203, Commercial Activities Program (Apr. 1994).
22. U.S. Dep't of the Air Force, Commercial Activities Program Instruction (AFCAPI) (July 1998).
23. U.S. Dep't of Navy, Secretary of the Navy Instr. 4860.44F, Commercial Activities (Sep. 1989).

APPENDIX B

COMPETITIVE SOURCING WEB SITES

<http://www.defenselink.mil> (General topics of interest in DOD)

<http://www.hqda.army.mil/acsim> (Army competitive sourcing)

<http://www.afcqm1.randolph.af.mil> (Air Force competitive sourcing)

<http://www.fac131.navfac.navy.mil/csso> (Navy competitive sourcing)

<http://www.arnet.gov> (Acquisition reform network)

<http://www.acq.osd.mil/iai/hrso> (DOD housing privatization home page)

<http://gao.gov> (GAO reports and decisions)